

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Country Home Products, Inc.,	:	
Plaintiff,	:	
	:	
	:	
v.	:	Docket No. 2:04-cv-111
	:	
Schiller-Pfeiffer, Inc., and	:	
JEP Management, Inc.	:	
Defendants.	:	

ORDER

Plaintiff Country Home Products, Inc. ("CHP") filed a Motion to Dismiss Defendants' Counterclaim under Fed. R. Civ. P. 12(b)(6) or, in the Alternative, to Appoint a Special Master under Fed. R. Civ. P. 53 (Paper 24) on February 10, 2005. CHP seeks to dismiss Counts I through V of the Counterclaim for reasons set forth in its earlier motion to dismiss, originally filed on July 20, 2004 in the Pennsylvania case. Defendants Schiller-Pfeiffer, Inc. ("Schiller") and JEP Management, Inc. ("JEP") have already withdrawn Counts III and V and the claims against individual defendants in Counts II and IV. This motion to dismiss relates to Count I, which alleges breach of contract, Count II, which alleges fraud and Count IV, which alleges equitable/promissory estoppel. CHP also seeks to dismiss claims of negligent and/or intentional misrepresentation in Count VI.¹

¹In Defendants' Amended Counterclaims to Plaintiff's Amended Complaint (Paper 26) and Defendants' Answer to Plaintiff's Amended Complaint, Affirmative Defenses, Amended Counterclaim and Demand for Jury Trial (Paper 30), Count IV addresses the negligent misrepresentation claim.

For the reasons that follow, CHP's Motion to Dismiss and, in the Alternative, to Appoint a Special Master is **denied**.

Discussion

I. Legal Standard

In order to decide a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accepting the complaint's allegations as true." Todd v. Exxon Corp., 275 F.3d 191, 197-98 (2d Cir. 2001). A district court may grant a Rule 12(b)(6) motion to dismiss if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 198 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Therefore, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" Id. (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

A. Breach of Contract, Fraud and Equitable/Promissory Estoppel Claims

CHP moves to dismiss three counts, breach of contract, fraud and equitable/promissory estoppel, filed in the matter of Schiller-Pfeiffer, Inc. and JEP Management, Inc. v. Country Home Products, Inc., C.A. No. 04-cv-1444 (E.D. Pa. Dec. 1, 2004).

First, CHP asserts that the breach of contract claim should be dismissed because it is contrary to public policy. Defendants allege that CHP breached the Letter of Intent ("LOI") by 1) entering into negotiations with the management buyout group

during the exclusive period; 2) furnishing non-public information about CHP's assets to the management buyout group during the Exclusive Period; 3) failing to notify Schiller and JEP promptly of the receipt of a proposal or inquiry from the management buyout group during the Exclusive Period and 4) failing to negotiate in good faith (Paper 26). In support of its claim, CHP relies on a Third Circuit case that cites policy considerations to suggest that bringing a breach of contract claim premised on a "no-shop" clause should not limit management buyout opportunities. STV Eng'r, Inc. v. Greiner Eng'g, Inc., 861 F.2d 784, 789 (3rd Cir. 1988) (noting that barring managers from pursuing a management buyout would limit, among other things, the "freedom of the managers"). Here, the Defendants' breach of contract claim also addresses other allegations arising from the LOI that are unrelated to policy considerations. The Court need not rule upon the policy considerations that restricting management buyouts may create at this early stage of the proceedings. Other grounds for the breach of contract claim suffice to warrant denial of the motion.

Second, CHP moves for dismissal of the fraud count because Defendants have not plead this claim with particularity. Fed. R. Civ. P. 9(b) provides that "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). In its amended counterclaim, Defendants have presented the circumstances surrounding the alleged fraud. For example, Defendants specifically allege that "CHP deliberately

misrepresented to Schiller and JEP its intention to honor the obligations contained in the LOI, when, in fact, it did not intend to honor those obligations." Defs.' Answer to Pl.'s Am. Compl. ¶ 64 (Paper 30). These allegations are sufficient to withstand a motion to dismiss.

Finally, CHP asserts that the claim for equitable/promissory estoppel should be dismissed because Defendants have failed to establish the elements of promissory estoppel and the claim is precluded by Defendants' breach of contract claim. Under the doctrine of promissory estoppel, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Tour Costa Rica v. Country Walkers, Inc., 171 Vt. 116, 120, 758 A.2d 795, 799 (2000). The Defendants note that "the allegations of the foregoing paragraphs are hereby incorporated by reference" in its equitable/promissory estoppel claim and have adequately addressed the elements of promissory estoppel in its amended counterclaim. Defs.' Am. Countercl. to Pl.'s Am. Compl. ¶ 75 (Paper 26). For example, "CHP specifically advised and represented to Schiller and JEP, prior to execution of the LOI, that all management buyout discussions had ceased, and that there were no further plans to explore a management buyout of CHP." Id. ¶ 28. Moreover, the promissory estoppel claim is not precluded by the breach of contract claim because contract and promissory estoppel have

distinct requirements. See Cweklinsky v. Mobil Chemical Co., 364 F.3d 68, 77 (2d Cir. 2004).

Defendants' Amended Counterclaim address the concerns raised in CHP's motion to dismiss. As such, the motion to dismiss the breach of contract, fraud and equitable/promissory estoppel claims are hereby denied.

B. Negligent Misrepresentation

CHP also seeks dismissal of the negligent misrepresentation claim based upon three grounds: (1) the complaint fails to state a cause of action for negligent and intentional misrepresentation by not asserting justifiable reliance upon any alleged misrepresentation; (2) Defendants fail to allege they could not verify or inquire into information provided by CHP; and (3) Defendants do not allege that they attempted to verify or inquire into CHP's information despite invitations to do so by CHP's counsel.

Negligent misrepresentation is defined under Vermont law as

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Repucci v. Lake Champagne Campground, Inc., 251 F. Supp. 2d 1235, 1238 (D. Vt. 2002). "A party claiming negligent misrepresentation 'may justifiably rely upon a representation when the representation is not obviously false and the truth of

the representation is not within the knowledge of, or known by the [claimant].'" Howard Opera House Assoc. v. Urban Outfitters, Inc., 166 F. Supp. 2d 917, 927 (D. Vt. 2001) (quoting McGee v. Vt. Fed. Bank, 169 Vt. 529, 531, 726 A.2d 42, 44 (1999)). In response to CHP's motion to dismiss, Defendants filed an Amended Counterclaim (Paper 26) which addressed issues raised in CHP's motion. Defendants now claims that it justifiably relied upon CHP's negligent misrepresentations and that it did not have the opportunity or the ability to verify or discredit those statements. The pleadings comply with the elements of negligent misrepresentation under Vermont law. The motion to dismiss the negligent misrepresentation claim is hereby denied.

II. Amended Counterclaim

CHP has objected to Defendants' Amended Counterclaim in a footnote to its reply memorandum (Paper 29), claiming that it was filed late without a required motion to amend for the Court's review. The Amended Counterclaim (Paper 26) was filed on March 1, 2005, within the required ten day period to respond to the motion to dismiss. The Court agrees that a motion to amend the counterclaim should have accompanied the filing. See L.R. 15.1. However, motions to amend during the early stages of litigation are rarely denied. Since the case is in its early stages, the Court will permit Defendants to file the Amended Counterclaim.

III. Appointment of a Special Master

In the alternative, CHP seeks the appointment of a special master pursuant to Fed. R. Civ. P. 53(a)(1). Under that

provision, special masters may be appointed by the Court to accomplish the following tasks:

(a) perform duties consented to by the parties; (b) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by (i) some exceptional condition, or (ii) the need to perform an accounting or resolve a difficult computation of damages; or (c) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

Fed. R. Civ. P. 53(a)(1).

Special masters appointed over the objection of a party may address only pretrial matters and may not become involved in deciding the ultimate issues in the case. The decision as whether to appoint a special master lies within the broad discretion of the Court. In re Bolar Pharm. Co., 966 F.2d 731, 733 (2d Cir. 1992).

CHP seeks the appointment of a special master to decide the ultimate issues in the case, that is, whether a management buyout existed and, if so, the reason for CHP's decision to terminate the possible sale to Defendants. Essentially, CHP is asking for a special master to be appointed to decide the merits of the parties' respective claims. The Court need not address the question as to whether it has the authority under Rule 53(a)(1) to appoint a special master for this purpose. The Court is fully prepared to address all outstanding pretrial and trial issues on a timely basis. In light of Defendants' demand for a jury trial and its objections to the appointment of a special master, the Court in the exercise of its discretion denies CHP's motion.

Conclusion

Wherefore, CHP's Motion to Dismiss and, in the Alternative, to Appoint a Special Master is **denied**.

Dated at Burlington, Vermont this 29th day of March, 2005.

/s/ William K. Sessions III

William K. Sessions III
Chief Judge, U.S. District Court